CHENG LEONG YEN

v.

HOOI LAM CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, PULAU PINANG
WAN ADNAN J
[CIVIL SUIT NO. 23-97-86]
24 JULY 1989

CIVIL PROCEDURE: *Summary judgment - Appeal against judgment of Senior Assistant Registrar - Triable issue on the construction of contract and admissibility of oral agreement when written agreement in existence.*

EVIDENCE: *Written contract as to payment of agent's commission - Whether separate oral agreement admissible in evidence.*

On or before February 1980 the plaintiff at the request of the defendants agreed to act as a broker/agent with one Tan Ah Poy to initiate or set up the development scheme in the property held under Holding No. 193 and 197 Mukim 16 Daerah Timur Laut Penang. The defendant's agreement was confirmed in writing in a letter dated 13 February 1980 where the defendants agreed to pay a specified sum to the plaintiff and Tan Ah Poy if the plan for the construction of flats were approved by the Local Authorities. The Local Authorities approved the layout plan, but at the commencement of the action the building plan had yet to be approved. The plaintiff claimed the sum of RM103,500 from the defendants as his share of the promised commission. The defendants alleged that by a separate oral agreement the plaintiff agreed to be paid only upon approval of the Layout and Building Plans and the commencement of the construction work.

The Senior Assistant Registrar gave plaintiff judgment for that sum with interest and cost. The defendants appealed against the decision.

Held:

[1] That there was a triable issue as to whether the defendants were allowed under proviso [b] and [c] of s. 92 of the Evidence Act 1950 to prove the existence of the separate oral agreement on the matter.

[2] There was also a triable issue as to the construction of the contract.

[Appeal allowed with costs.]

Cases referred to:
Luxor (Eastbourne) Limited v. Cooper [1941] All ER 108
Christie Owen & Davies Ltd. v. Rapacioli [1974] 2 WLR 723

Legislation referred to
Evidence Act 1950, s. 92

For the plaintiff - Ganesh Ponniah; M/s. Geh Cheng Lok & Co.
For the defendants - Yeang Kok Kheang; M/s. Yeang & Co.

JUDGMENT

Wan Adnan J:

This is an appeal against the decision of the Senior Assistant Registrar in giving judgment for the plaintiff in the sum of Ringgit One Hundred and Three Thousand and Five Hundred (RM103,500) together with interest and costs.

The case for the plaintiff is that on or before February 1980 at the request of the defendants he had orally agreed to act as a broker/agent together with one Tan Ah Poy to initiate and/or set up a development scheme in property known as Holding No. 193 and 197 Mukim 16 Daerah Timur Laut Penang and in consideration thereof the defendants had agreed to pay the plaintiff and the said Tan Ah Poy commission and reward. The defendants' agreement was confirmed in writing contained in the defendants' letter to the plaintiff and the said Tan Ah Poy dated 13 February 1980. The letter reads as follows:

Re: Holding Nos. 193 & 197 Mukim 16
D.T.L. Penang

> With reference to the above land and our agreement with landlord of the above property. We wish to confirm that you both as brokers of the above land will be jointly entitle to RM1,000 per unit if plan for flats are approved by the Local Authorities.
>
> In the event only semi-detached houses are approved a sum of RM2,500 will be paid to you jointly for each unit.

The plaintiff further says that by the defendants' letter dated 15 January 1985 the defendants had informed him that the layout plan for the proposed block of 15 storey low cost flats (207 units) had been approved by the Majlis Perbandaran Pulau Pinang. The letter reads as follows:

> Further to our letter to you dated 13 February 1980 we wish to inform you that the layout plan for the proposed one block of 15 storey low cost flats (207 Units) has been approved on 13 December 1984 by Majlis Perbandaran Pulau Pinang.
>
> Kindly come to our office within seven (7) days from date of this letter to solve out/discuss problems with the land owner Mr. Tan Cheng Kang in connection with the overall development of the above mentioned Low Cost Flats. We are writing this letter to both of you because both of you are brokers of the above land. If both of you do not come to our office within the stipulated time above-mentioned, then your right, interest as brokers as mentioned in our letter to you dated 13 February 1980 will be void and of no value.

The plaintiff contends that he was therefore entitled to be paid RM103,500 being his share of the promised commission.

The defendants by their defence contend that the terms of the employment were agreed orally and that the defendants would pay the agreed commission to the plaintiff only upon approval of the Layout plan, building and other plans by the relevant authority. Further, they contend that the word "plan" in their letter dated 13 February 1980 was meant to refer to the building plan which was yet to be approved. In his affidavit affirmed on 13 January 1987 Soon Wan Kim the managing director of the defendants says that a joint venture agreement was entered into on 29 January 1980 between the defendants and the owner of the lands in question. In the said joint venture agreement the defendants had agreed to pay the said owner certain sums "upon approval of the layout and building plans and upon commencement of building works." He further affirmed that similarly it was orally agreed between him as the defendants' representative and the plaintiff that only upon approval of layout and building plans and upon commencement of building works that the plaintiff would be paid.

The plaintiff relies on the provisions of s. 92 of the Evidence Act 1950 which is as follows:

> 92 When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s. 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

The defendants contend that by virtue of provisos (b) and (c) of s. 92 of the Evidence Act they are entitled to prove the existence of a separate oral agreement. Provisos (b) and (c) read as follows:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document;
>
> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

The legal position in a case where an agent has been promised a commission was stated in the House of Lords case of *Luxor (Eastbourne) Limited v. Cooper* [1941] All ER 108 as follows:

> and the legal position can be stated thus: If according to the true construction of the contract the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is debitum in praesenti even though only solvendum in futuro), then no act or omission by the principal or anyone else can deprive the agent of that right; but until that event has happened the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client.

Again in *Christie Owen & Davies Ltd. v. Rapacioli* [1974] 2 WLR 723 James LJ on behalf of the Court of Appeal said:

> To ascertain whether an agent is entitled to commission one must look to see what is the event on the happening of which commission is payable. If the event has happened, the commission is due; otherwise, it is not.

In this case what has to be decided first, is the true construction of the contract, namely the written promise of the defendants to pay "if *plan* for flats are approved by the Local Authorities.", (emphasis is added); and secondly, whether that event had happened.

It seems that for any land development two types of plans are required to be approved, namely, the layout plan and the building plans. It is not disputed that at the commencement of the action only the layout plan of the proposed block of 15 storey low cost flats had been approved. The building plans were yet to be approved. The word used by the defendants in their letter dated 13 February 1980 is only "plan". It is silent as to whether it refers to "the layout plan" of "the building plan". In my view there is a triable issue whether the defendants should be allowed under proviso (b) to the s. 92 of the Evidence Act 1950 to prove the existence of a separate oral agreement on the matter.

On 29 January 1980 a joint venture agreement for the development of the said lands was entered into between the defendants and the land owner. The plaintiff was instrumental in bringing about the agreement. This was a formal agreement and in it the defendants had agreed to pay to the landowner certain sums "upon approval of the layout and building plans and upon commencement of the building works." The defendants' promise to pay to

the plaintiff was merely made in the form of a letter. In my view there is also a triable issue whether the defendants should also be allowed to prove the existence of a separate oral agreement under proviso (c) of s. 92 of the Evidence Act 1950.

I therefore find that there are triable issues as regards the construction of the contract which should go for trial. I therefore allowed the appeal with costs and granted the defendants unconditional leave to defend.

Also found at [1990] 1 CLJ 251